

1 to carry a network, I would think about all
2 those things.

3 Q Including, you know that there was
4 a proposal from Tennis Channel to Comcast in
5 2009 that Comcast rejected, right?

6 A Yes, I am aware of that.

7 Q And you would have expected
8 Comcast at that point in time as well when it
9 was looking at whether or not to accept or
10 reject that proposal, to consider these
11 factors, right?

12 A No, not necessarily. I think --
13 give me a moment here. Okay. So if we go to
14 paragraph 11, I'll just read what I wrote
15 because it'll probably say it better than if
16 I do it off the top of my head.

17 "The MVPD analysis of these three
18 considerations and the weight given each in
19 the equation necessarily over time since
20 they're driven by the evolving business
21 imparities and opportunities."

22 So, when we come to 2009 if I'm

1 Comcast, I know the content, I know what's on,
 2 I'm carrying it and I'm making it available to
 3 my customers. I know the management. So what
 4 really becomes critical to me now is this
 5 repositioning financially reasonable from the
 6 point of view of my customers and my company?
 7 It's clearly reasonable -- or that's not the
 8 right word. It's clearly favorable to the
 9 programmer, but how's it treating the rest of
 10 us.

11 Q Okay. Do you recall being deposed
 12 in this case?

13 A I do.

14 Q Do you recall Mr. Phillips asking
 15 you at your deposition "Now you list these as
 16 important factors. Do you think that Comcast
 17 should have considered each of these factors
 18 in making its decision with respect to the
 19 Tennis Channel?" Answer: "I do." Do you
 20 recall that answer?

21 A I -- I don't recall it, no.

22 Q Do you know whether Comcast

1 specifically checked off -- well, let me ask
2 you about each of them.

3 The first factor is content. And
4 part of what you talk about in talking about
5 content is whether a channel serves an under
6 served niche, something that's not available
7 elsewhere, or whether it duplicates content
8 that's already available. Is that one of your
9 considerations?

10 A Yes.

11 Q And there's no other channel that
12 focuses on tennis, is there?

13 A Entirely?

14 Q Yes.

15 A No.

16 Q There's more golf on broadcast
17 television than there is on tennis, correct?

18 A There's more golf then tennis on
19 broadcast television?

20 Q Yes, outside of their
21 respective channels? There's more golf
22 outside of Golf Channel than there is tennis

1 outside of Tennis Channel?

2 A I -- I -- I think that's correct.

3 Q And you can't tell me, can you,
4 that the Golf Channel is as necessary to its
5 golf niche as tennis is to the tennis niche?

6 A I -- I didn't study that. I don't
7 know.

8 Q Same for hockey; you can't tell me
9 whether there were under served niches for
10 hockey in, say, 2009?

11 A I can't -- I can't say.

12 Q And Comcast has, in fact, given
13 broader carriage to two hockey channels,
14 correct, Versus and the hockey channel?

15 A The NHL Network?

16 Q Yes.

17 A So you're asking me does Versus --
18 do Versus and the NHL Network have broader
19 carriage within Comcast? To the best of my
20 knowledge they do.

21 Q Okay. Do you know if that's an
22 under served niche, if it's a niche that

1 merits two networks, hockey, is that something
2 you've analyzed?

3 A I don't know. I don't know. I --
4 I can tell you that there is consumer demand
5 for NHL Network. There is distributor demand
6 for NHL Network which seems to be an
7 indication of -- you know, its desirability.
8 I can tell you those.

9 Q Okay. Second factor's ownership
10 and management. You haven't evaluated the
11 quality of Tennis Channel's management, have
12 you?

13 A I have no reason to believe that
14 Tennis Channel's management is anything other
15 than professional and accomplished.

16 Q And you don't know whether Comcast
17 considered the quality of Tennis Channel
18 management, do you?

19 A I don't know whether they
20 considered it in 2005, and I don't know
21 whether they considered in 2009.

22 Q The third factor is cost and

1 revenue potential. You don't know whether
2 Comcast considered revenue potential for
3 Tennis Channel when it made its decision on
4 the Tennis Channel, do you?

5 A Well, there I have some evidence
6 in I want to say Gaiski or -- and/or Bond that
7 -- that they did look at -- you know the
8 drivers of subscription revenue, and that is
9 customers, their customers. And -- and -- and
10 so I think from the largest part of their
11 revenue base, subscription revenue, I think
12 they -- I think they did take that into
13 account.

14 Q Do you know if they did any kind
15 of systematic look at that question that you
16 saw?

17 A Well, I think they did. My
18 understanding, again from -- from what I read,
19 is that Gaiski specifically undertook talking
20 to the field management responsible for
21 relaying customer requests, customer calls for
22 positioning of Tennis Channel. And -- and the

1 results were pretty clear that there wasn't --
2 they -- they were communicating to her that we
3 want to do this; that customers are telling us
4 we should do this.

5 Q Did you try to quantify the dollar
6 difference it might make in terms of revenue,
7 did you see anything like that?

8 A Did Comcast try and quantify?

9 Q Yes, sir.

10 A To the best of my knowledge, they
11 didn't. It could be there's something, record
12 elsewhere that says they did. I am not aware
13 of it.

14 Q Do you know if they considered
15 revenue potential in making carriage decisions
16 for the Tennis Channel?

17 A I don't know.

18 Q Same answer for Versus, NHL
19 Network and MLB Network?

20 A I don't know about Versus.

21 I believe in the cases of MLB, and
22 did you ask about NHL? Was that you other?

1 Q It was, sir.

2 A I believe they're, again, in the
3 same metric which is not to be overlooked.
4 The key driver for a cable company, and that
5 is customer satisfaction, customer demand. As
6 I understand it from what I've -- I've learned
7 in this exercise the -- the character of that
8 programming was something that they wanted to
9 -- to have and to continue to have hockey and
10 baseball programming. And the reason for that
11 is that they felt that customers wanted that.
12 And so to me, that is a revenue consideration.

13 Q Nothing in terms of specific
14 dollars or anything like that, though? No
15 modeling that you've seen --

16 A Again -- sorry.

17 Again, I've not -- not seen it.
18 Could be it's there, I haven't seen it.

19 Q As I understand your report you
20 really focused your analysis Golf, Versus and
21 Tennis Channel, is that fair?

22 A Yes, correct.

1 Q Your comparisons weren't done for
2 NHL, NLB or MBA, correct?

3 A Correct.

4 Q Okay. So all focused on those
5 three that you focused on. And what I heard
6 you say is that you watch programming and you
7 categorized it in to certain categories and
8 made judgments about how it fit in those
9 categories, is that fair in terms of your
10 programming analysis?

11 A Correct.

12 Q Did you ever see Comcast do a
13 metric like that where someone sat down at
14 Comcast and said "Here's how much live event
15 and here's how much non-event" the kind of
16 slicing of the data that you did?

17 A I don't know what they did.
18 Again, you could the fact witness that. I
19 wouldn't suspect they did what I did because
20 you would not typically. That wouldn't be the
21 customary behavior of an MVPD who -- I'm
22 trying to discern a claim of substantial

1 similarity in programming; they're not.

2 Q Let me ask you about. You've
3 drawn your experience, and as I understand
4 your primary experience is your experience in
5 the cable industry, is that correct?

6 A Correct.

7 Q In your experience in the cable
8 industry have you ever seen anyone apply this
9 programming method that you applied in this
10 case in terms of sitting down and slicing the
11 hours up by live event, non-live event and
12 then slicing further within live event? Is
13 that anything you've seen?

14 A I have -- I have not. I've not
15 been involved in something like this before so
16 maybe others have done it. Again, I don't want
17 to rule it.

18 Q All right. As I understand it,
19 you had data on 52 weeks for all of the
20 networks, is that right? One year's worth of
21 data in terms of the program schedule and
22 availability of programming?

1 A Well, I had -- I had programming
2 schedules for 2009 and 2010 --

3 Q Okay.

4 A -- for each of the three. And I--
5 you know, I set out through internet research
6 and websites and so on and so forth, a lot of
7 other information. So to be responsive to
8 your question, you know I did -- but in terms
9 of my sample weeks it was a smaller set than
10 you described?

11 Q Okay. And that's what I'm getting
12 at. I guess I had misunderstood. You had
13 access to data for, I guess, 104 weeks, two
14 years, correct?

15 A Correct.

16 Q And you looked at 15 weeks out of
17 that dataset in terms of your analysis, in
18 terms of your primary analysis?

19 A Ah, no. Let me -- let me clarify.

20 So, what I did is, and again with
21 the help of my colleague, right. So, I
22 counted for Versus, Golf and Tennis Channel.

1 I counted 52 weeks, 365 days of their
2 programming to -- I examined 365 days, all of
3 2010, 52 weeks for all three channels to count
4 the amount of hours of live and first run same
5 -- same day programming. Because as I
6 explained earlier, to me that's the gold
7 standard of timeliness in sports. So I looked
8 at 52 weeks of 2010. However, what we were
9 speaking of earlier, the sample I took to do
10 an analysis of all of the programming was a
11 smaller subset of that. In the case of events
12 15 weeks right through the year. And in the
13 case of non-events, with ten weeks.

14 Q And that's what I'm getting at,
15 that analysis you did on events --

16 A Okay.

17 Q -- versus non-events; that was 15
18 weeks out of the 104 weeks set you were doing?

19 A Well, it's really an unfair
20 characterization. Because each year it should
21 be looked at by itself. So it's 15 weeks out
22 of 52 weeks.

1 Q Okay. And you didn't do that
2 analysis on the other year, did you?

3 A I didn't do that for what?

4 Q For the other year?

5 A No, I didn't.

6 Q Okay. Now in the 15 weeks you
7 looked a you picked a high week. One of the
8 weeks you picked was you called the "high
9 week." And as I understand the idea in
10 picking the high week was you wanted to make
11 sure you wanted the best weeks for each of the
12 three networks to kind of barely compare them,
13 correct?

14 A Yes. I'm, not sure I used the
15 term "high." If I did, it was a glib there.

16 So what I wanted -- what I did is
17 I took 14 weeks that were in common among the
18 three channels, 14 weeks or the same. And
19 then one week I went in to look for the
20 highest profile programming.

21 So, in the case of Tennis, it's a
22 Grand Slam. In the case of Golf is was around

1 the Masters. And in the case of Versus, it
2 was, I think, NHL.

3 Q And you wanted to get that highest
4 profile programming to kind of look at the
5 channels at their best and fairly compare them
6 at their best, right?

7 A Generally that's correct.

8 Q And you always said this: The
9 programming for Golf was the players. The
10 programming for Versus was during the NHL
11 playoffs, do you remember that?

12 A Yes, you don't -- I'm not sure
13 that in Golf's case it was the players, so --

14 Q It's footnote 10.

15 A Yes. That's why I just wanted to
16 look. Okay. So footnote 10.

17 Q In your report. I don't mean to--

18 A Yes. There's a lot of data in this
19 report, so --

20 Q I understand.

21 A -- remembering it all off the top
22 of my head is not my strongest suit here.

1 Players, correct.

2 Q And NHL playoffs for hockey?

3 A Correct.

4 Q Not the Stanley Cup Finals because
5 Versus doesn't the full Stanley Cup Finals,
6 right?

7 A They have two of the seven. Well,
8 potentially seven games.

9 Q So you didn't pick the finals?

10 A I don't think it was, but -- you
11 know, I'm not going to guarantee that. I
12 don't -- I just don't recall. But it's
13 certainly NHL playoffs.

14 Q For Tennis Channel you picked the
15 week of the finals for the U.S. Open, correct?

16 A That's correct.

17 Q Even though that's not really the
18 highest profile week for Tennis Channel during
19 the U.S. Open, was it?

20 A I'm -- perhaps you could explain
21 what you mean.

22 Q The finals of the U.S. Open are

1 carried on CBS, correct?

2 A The final matches?

3 Q Yes.

4 A Yes.

5 Q So the week before, you were
6 looking at live programming versus non-live
7 programming, first run programming versus non-
8 first programming. Does it surprise you to
9 hear that the week before, the week that you
10 picked as Tennis Channel's week, is actually
11 much more favorable to Tennis Channel?

12 A And could you perhaps explain why
13 it is more favorable?

14 Q Sure. Before I do, let me ask you
15 this: Did you do any kind of ratings analysis
16 or popularity analysis to make sure you were
17 picking the right weeks?

18 A For this exercise I didn't, no.

19 Q Okay.

20 MR. SCHMIDT: Your Honor, may I
21 approach?

22 JUDGE SIPPEL: Please do.

1 BY MR. SCHMIDT:

2 Q I'd like to give you two exhibits,
3 neither of which is in evidence. Tennis
4 Channel 402 and 403.

5 MR. SCHMIDT: Try to do this so we
6 can move on.

7 JUDGE SIPPEL: Thank you. Are
8 these in or not in?

9 MR. SCHMIDT: Not yet in.

10 JUDGE SIPPEL: Okay. 402 and 403
11 identified by Tennis Channel.

12 (Whereupon, the document was
13 identified as Exhibits 402 and
14 403.)

15 MR. SCHMIDT: If Mr. Toscano has
16 no objection, I'll move them into evidence.

17 MR. TOSCANO: Let me take a look.

18 MR. SCHMIDT: And, Your Honor,
19 these are the same kind of programming
20 schedules, similar to what was used with other
21 witnesses.

22 MR. TOSCANO: And what is the

1 source of this?

2 MR. SCHMIDT: I think it was
3 printed off a website. No, I'm sorry. It's
4 a produced document.

5 MR. TOSCANO: I see.

6 No objection, Your Honor.

7 JUDGE SIPPEL: Okay. Then Tennis
8 Channel's Exhibit 402, Tennis Channel's
9 Exhibit 203 as identified by Mr. Schmidt are
10 received in evidence at this time.

11 (Whereupon, Exhibits 402 and 403
12 previously identified were
13 received into the record as
14 Exhibits 402 and 403)

15 JUDGE SIPPEL: You may proceed,
16 sir.

17 MR. SCHMIDT: Thank you, Your
18 Honor.

19 BY MR. SCHMIDT:

20 Q So here's maybe the easiest way to
21 do this Mr. Egan.

22 A Yes.

1 Q If you put these side-by-side what
2 you'll see is that 403 is the week on Tennis
3 Channel of September 6, 2010, which is the
4 week you looked at, that's your high week and
5 put into your report, correct?

6 A Yes.

7 Q And 402 is the week before on
8 Tennis Channel, it's the week of August 30th,
9 correct?

10 A It seems to be correct.

11 Q And you can count it if you want
12 or you can go out on a limb and trust my math.
13 As I count it in the week you chose, which is
14 Exhibit 403, there were 28« live or first run
15 programs. And you can tell because they're in
16 the blue on that one. Whereas, in the week
17 you didn't choose as the high week, 402,
18 there's about 52 hours. Does that look right
19 to you? Do you have any reason to qualify
20 that?

21 A No, I'll accept your numbers.

22 Q And you can also see just

1 eyeballing it that 402 has much higher ratings
2 a well, doesn't it?

3 A Correct.

4 Q So your high week wasn't really
5 Tennis Channel's high week, was it in that
6 range?

7 A Well, can you explain to me why
8 the -- okay. So the only thing you've covered
9 here -- colored is the live same day stuff?

10 Q My first question was about live
11 same day. My second question was about just
12 looking at the ratings overall.

13 A Well, I'm trying to understand
14 what I'm looking at. So are you telling me
15 that the only thing you've colored here is the
16 live same day programs from the U.S. Open?

17 Q If you look at the bottom there's
18 a key.

19 JUDGE SIPPEL: Take your time
20 until you get it synchronized.

21 THE WITNESS: Right.

22 So I'm wondering why then -- you

1 know, I'm sure it's just I don't understand,
2 so you can explain it to.

3 So when I look at Wednesday, the
4 8th, it's colored in the live same day first
5 run color at 11:00, and yet it says
6 "prerecorded." And then above it it says
7 "live." So I'm confused.

8 Q Well, this is the week you looked
9 at. Did you figure out the answer to that.

10 A No, I asked the question of you.
11 I'm trying to understand why its color coded.

12 Q Because the way it works I can't
13 give you answers, I can only ask you
14 questions. So if you're not --

15 A I find your exhibits unreliable. I
16 don't know what I'm looking at.

17 Q Okay.

18 A But if you want to get to your
19 point of comparability, I'm happy to do so. I
20 can't vouch for what you've given me here.

21 Q Okay. Well this is what was
22 produced in this litigation. And I believe --

1 did you look at these documents

2 A Did I look at these exhibits?

3 Q Yes. Are these the schedules you
4 look at in reaching your opinions?

5 A I looked at schedules provided to
6 Comcast lawyers, full year schedules, and
7 that's what I looked at.

8 Q Did you look at these ones?

9 A I didn't look at your exhibits, if
10 that's what you're asking me?

11 Q That's what I'm asking you. Did
12 you get down to this level of granularity?

13 A I didn't look at your exhibits. I
14 looked at these schedules as provided to me by
15 Comcast lawyers. They -- they look a lot like
16 this, except they're not color coded the way
17 you have them. And that's why I find it a
18 little odd they're color coded the way they
19 are, and it doesn't seem to be consistent
20 between the two nor with the nomenclature
21 below.

22 Again, you have something down

1 below that's a U.S. Open match and its not
2 colored at all.

3 So, you know, I'm just not sure
4 what I'm looking at here.

5 Q All right.

6 MR. TOSCANO: Paul, I will say
7 these are different than the programming
8 schedules that you produced.

9 BY MR. SCHMIDT:

10 Q Why don't you help me out by
11 telling me what you were looking at?

12 A I looked at the weekly grids--

13 Q No, I'm sorry. You just referred
14 to things you were confused by in Exhibit 403.

15 A Okay. So, I pointed one out. I
16 asked you why something is labeled live and
17 then it says prerecorded under it.

18 Q Yes. I'm trying to figure out
19 where you're pointing to.

20 JUDGE SIPPEL: Are you in 402 or
21 403?

22 THE WITNESS: Okay.

1 JUDGE SIPPEL: Take your time.

2 THE WITNESS: It's 403, and it's
3 Wednesday the 8th. And it's 11:00. It says
4 "U.S. Open coverage live, Nadal v. Lopez."
5 And then it says "prerecorded."

6 BY MR. SCHMIDT:

7 Q That could be a first run match,
8 correct?

9 A It could be a first run match
10 potentially, but it can't be live if it's
11 prerecorded.

12 Q Well, isn't it possible that it's
13 part of a larger programming called U.S. Open
14 Live Coverage which includes live programs and
15 includes first run matches?

16 A As me the question again. I'm
17 trying to follow your logic. What -- it could
18 be what

19 Q Part of a larger programming
20 block. A larger programming block is called
21 "U.S. Open Live Coverage," and then within
22 that some of that is live and some of that is

1 first run match?

2 A Potentially what's labeled live
3 could be prerecorded under that explanation,
4 correct.

5 Q Why don't we put that aside and --

6 A And then -- the second question is
7 why is the encore stuff not colored as it is
8 on the programming schedules that Tennis
9 Channel has on its website and that were
10 provided to me? So that we could actually see
11 all of the tournament coverage here, not just
12 the live same day coverage. Because it would
13 make a big difference in looking at these
14 schedules.

15 Q I'm focused on the live coverage.
16 Encore matches are not live coverage or first
17 run matches, correct?

18 A That's correct.

19 Q Okay. Let me ask you a question
20 about price. Do you understand that --

21 MR. SCHMIDT: Do we need anyone to
22 leave the room?

1 JUDGE SIPPEL: I'm afraid you have
2 to, sir.

3 MR. SCHMIDT: I apologize.

4 JUDGE SIPPEL: Well while he's
5 leaving the room - pardon?

6 MR. SCHMIDT: I'm actually going
7 to ask about --

8 JUDGE SIPPEL: No, no, please
9 leave it --

10 MR. TOSCANO: The price of what?

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